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*Exhibit
P. 20*

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-188771

DATE: December 8, 1977

MATTER OF: Tennessee Valley Service Company

DIGEST:

1. IFB provided that performance period was from March 15, 1977, or 5 days after award, if later, until March 14, 1978. Bidder confirmed bid on August 15, 1977, after GAO decision upholding its preaward bid protest and during GAO review of another firm's request for reconsideration of that decision, on condition that award be for performance period of 1 year from award. Bid was thereby rendered ineligible for acceptance, since award of contract pursuant to advertising statutes must be on same terms offered all bidders, and various IFB clauses cited by bidder concern post-award situations.
2. Although bids under canceled IFB expired during GAO consideration of protest against cancellation, where GAO decision recommends reinstatement of IFB, successful bidder may still at its option accept award thereunder.
3. Claim for anticipated profits and for cost of pursuing bid protest is rejected.

Invitation for bids (IFB) No. DAH03-77-B-0023 for moving services was issued on February 18, 1977, by the United States Army Missile Materiel Readiness Command. The period of performance was from March 15, 1977, "or five (5) days after award of contract, if later," through March 14, 1978. After bids were opened, the Army determined that the solicitation's evaluation clause was ambiguous. Under one interpretation of the clause perceived possible by the Army Tennessee Valley Service Company (TVS) would have been entitled to award, and under another, Maintenance, Inc., would have been. The Army therefore canceled the IFB and resolicited for the requirement.

TVS and Maintenance both protested the cancellation. In our decision in Tennessee Valley Service Company, B-188771, July 20, 1977, 77-2 CPD 40, we recommended that the canceled solicitation be reinstated and award made thereunder to TVS, if otherwise proper.

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That decision was subsequently affirmed in response to an August 12 request by Maintenance that we reconsider. See Tennessee Valley Service Company--Reconsideration, B-188771, September 29, 1977, 77-2 CPD 241.

Pursuant to Armed Services Procurement Regulation (ASPR) § 2-407.8(h)(3) (1976 ed.), the Army withheld award under IFB -0023 during our consideration of the initial protests. We are now advised that on August 4 the contracting officer asked TVS to confirm its bid, which TVS did by letter of August 15 "on the condition that the contract be awarded for a term of one year from the date of award." Maintenance had filed its request for reconsideration in the intervening period, and the Army determined to withhold award to TVS while we considered that request.

In accordance with our July 20 and September 29 decisions, the Army has attempted to award a contract to TVS under IFB -0023 for the period beginning 5 days after award until March 14, 1978. However, TVS has requested that our Office direct the Army to award a contract to TVS for a term of 1 year, which was the contract period contemplated under IFB -0023 as initially issued and was the basis upon which TVS conditioned the confirmation of its bid on August 15. TVS suggests that such award would be authorized by paragraph J-3 of the IFB, "Requirements" (see ASPR § 7-1102.2 (1976 ed.)); paragraph L-1 clause 2, "Changes" (see ASPR § 7-1902.2 (1976 ed.)); and paragraph L-1 clause 30, "Government Delay of Work" (see ASPR § 7-104.77 (1976 ed.)). In the alternative, TVS requests \$10,000 in damages, on the following basis:

"This contract should have been awarded to Tennessee Valley Service Company on or about March 15, 1977. The fact that it was not awarded at that time was entirely the fault of the government and in no way the fault of Tennessee Valley Service Company. The continued delay and eventual refusal of the Contracting Officer to award this contract to Tennessee Valley Service Company coupled with the fact that it awarded the work to another bidder during the delay we believe shows bad faith on the part of the Contracting Officer. The Contracting Officer's unwarranted delay in awarding the contract, her eventual refusal to award the contract to Tennessee Valley Service

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Company, her award of the work to another bidder while Tennessee Valley Service Company's protest was pending, and her causing Tennessee Valley Service Company to protest her improper cancellation and award several times over a period of six (6) months have damaged Tennessee Valley Service Company in the amount of \$7,000.00 (contract price minus cost of performance) and caused it to incur attorneys' fees of approximately \$3,000.00."

The IFB, by providing that the contract awarded would run from March 15, 1977, "or five (5) days after award of contract, if later," clearly advised bidders that the performance period could be less than 1 year. In any case, since award of a contract pursuant to the advertising statutes must be made on the same terms offered to all bidders, see The Manbeck Broad Company, B-190043, October 5, 1977, 77-2 CPD 273, award under IFB -0023 could not properly include a performance period after March 14, 1978, as suggested by TVS. Moreover, by conditioning acceptance of the award on August 15 on a basis inconsistent with the terms of the solicitation, TVS rendered itself ineligible for award. See Coronis Construction Company, et al., B-186733, August 19, 1976, 76-2 CPD 177. In this connection, the IFB provisions cited by TVS provide no basis to extend the effective period of the proposed contract. Paragraph J-3 merely sets out basic information concerning the rights of the Government and a contractor during the performance period prescribed in a requirements contract. Clauses 2 and 30 of paragraph L-1 concern matters arising after contract award.

In view of the above, award should be made under IFB -0023 to the second low bidder, if otherwise proper and practical. In this connection, although other bids under IFB -0023 have presumably expired, we have held that in such a situation a bidder may still at its option accept an award. See Guy F. Atkinson Company, The Arundel Corporation, Gordon H. Ball, Inc., and H. D. Zachry Company, (a joint venture), 55 Comp. Gen. 546, 550 (1975), 75-2 CPD 378.

In regard to the request for \$7,000 in damages representing "contract price minus cost of performance," i.e., anticipated profits, such claims have continually been rejected. Concerning TVS's attorney's

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fees, the cost of pursuing a bid protest is also noncompensable.
See Bell & Howell, 54 Comp. Gen. 937 (1975), 75-1 CPD 273.


Deputy, Comptroller General
of the United States